No. 15,586

IN THE

United States Court of Appeals

For the Ninth Circuit

ELIZABETH G. WILLIAMS, Executrix of the Estate of Preston L. Lykins, Deceased,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the Judgment of the United States District Court for the Northern District of California.

REPLY BRIEF FOR APPELLANT.

ROBERT C. HARRIS,
JULIAN N. STERN,
CHARLES A. WOOD, JR.,
HELLER, EHRMAN, WHITE & MCAULIFFE,
14 New Montgomery Street, San Francisco 5, California,
Attorneys for Appellant.

Subject Index

Table of Authorities Cited

Cases

Codes

No. 15,586

IN THE

United States Court of Appeals

For the Ninth Circuit

ELIZABETH G. WILLIAMS, Executrix of the Estate of Preston L. Lykins, Deceased,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the Judgment of the United States District Court for the Northern District of California.

REPLY BRIEF FOR APPELLANT.

ARGUMENT.

In its Brief Appellee takes the position that Section 162 of the Internal Revenue Code of 1939 sets forth three requirements for deductibility, and that these requirements are not satisfied in this case. In presenting its argument Appellee indulges in certain legal and factual misconceptions to which Appellant respectfully calls this Court's attention.

I.

Appellee views this case as being simply a bequest of Preston's estate to his wife, Mary, and contends that

Mary's subsequent death and the creation of a charitable residue from her estate are factors "extraneous" to the will of the decedent which should not be considered. But Appellee merely states this conclusion without stating reasons therefor. No attempt is made to answer Appellant's argument that the impact of later events upon the will or provisions of a trust, can and do change the tax consequences of the income of an estate or trust. In other words, Appellee does not answer Appellant's contention that a change in the taxable status of the recipient of Preston's estate is relevant to whether or not the income of Preston's estate is permanently set aside for charity. While the change occurred outside of Preston's will, nevertheless the charity became entitled to the corpus and income of Preston's estate because of the initial disposition in Preston's will. Preston's will is the first step in the chain of causation which leads to receipt by the charity as such. The income is set aside "pursuant to", i.e. "in consequence of", "conformable", "following", Preston's will. (Cf. *Old Colony Trust Co. v. Commissioner,* 301 U.S. 379, 383 (1937).

II.

Appellee admits that the income of Preston's estate, subsequent to the death of Mary, was permanently set aside for charity. (Brief for Appellee, p. 9.) Appellee argues, however, that the setting aside was not "pursuant to the terms of the will".

This statutory requirement simply denies the particular charitable deduction where a trustee or executor has any election or choice as to whether or not any income should be given to charity. The purpose of the statutory pro-

vision is merely to condition the charitable deduction on the certainty of the ultimate destination of the income before its receipt. In this case, at the moment of Mary's death there was no discretion in any person acting in any capacity whatsoever as to whether charity would receive the corpus and income from Preston's estate. The charitable destination was clear and the purpose of the statutory provision was satisfied.

Appellee's citation of *Falk v. Commissioner,* 189 F. 2d 806 (3rd Cir. 1951), cert. den. 342 U.S. 861 (1951), in which the trustee had broad discretion to decide whether any charity should receive any trust income, rather than limited discretion to choose a particular charity overlooks this distinction which is readily revealed by comparing *Old Colony Trust Co. v. Commissioner,* 301 U.S. 379 (1937), with the *Falk* case. This distinction would appear similar to the dichotomy in result between those cases involving the assignment of corpus which produces income and the mere assignment of the income. Compare *Commissioner v. Blair,* 300 U.S. 5 (1937), with *Harrison v. Schaffner,* 312 U.S. 579 (1941).

III.

Appellant does not interpret the statutory requirement that income be permanently set aside "pursuant to the terms of the will or deed creating the trust" as constituting an implacable barrier to the charitable deduction in question. Neither do we agree with Appellee's apparent belief that it is necessary that the charitable trust be set up directly by the decedent's will. "Pursuant to" is a phrase capable of broad definition, which, according to the Supreme Court, does not mean "directed or definitely

enjoined." See *Old Colony Trust Co. v. Commissioner,* 301 U.S. 379, 383 (1937). The statutory requirement would appear satisfied if Preston's will is an essential link in the chain by which the charity becomes entitled to Preston's corpus and the income therefrom. And it can hardly be argued that Preston's will was not the primary link in the chain of causation, with Mary's estate being merely a conduit to the ultimate charitable recipient. The fact that Mary's estate is interposed between Preston's will and the charities should not defeat the charitable deduction. This interposition of Mary's estate is no different from the interposition of a testamentary trust between an estate in administration and distribution of income to charity.

Moreover, the inexact words of the statute do not specify any particular trust or any particular will creating the trust. The inexactitude of the statutory language is made clear by the fact that a technically literal construction would deny the charitable deduction in any case in which a charitable trust has not been set up during the year in question, since the phrase on which Appellee relies is stated in terms of the creation of a trust. Needless to say, early attempts of the Treasury Department at so technical a construction of the statutory language were not successful. In fact, the charitable deduction is even allowed to an estate in the process of administration, though a trust will never be set up. *Bowers v. Slocum,* 20 F. 2d 350, 352 (2d Cir. 1927).

In any case, all that would appear necessary is that there be a trust, by the terms of which it is definite that income will ultimately be received by a charity. The

charitable trust set up under Mary's will, by which the subsequent income from Preston's estate was clearly destined for charity, satisfies this requirement.

IV.

Finally, Appellee falls back on the contention that there was no income in Preston's estate to be set aside for charity. Possibly, Appellee is not too confident that this Court will permit a narrowly technical construction of an inexact statute to defeat a charitable deduction which conforms to the spirit of Congressional regard for charitable beneficence. Otherwise, there would appear to be no warrant for Appellee's ultimate reliance upon an argument which is contrary not only to the facts in this case, but also to California law and the position taken by Appellee in cases involving similar issues.

Appellee has apparently overlooked the facts in this case when it states that Appellant has not shown that Preston's estate had income for the calendar year 1951 in excess of administration expenses. The Stipulation of Facts contains a copy of the fiduciary income tax return for Preston's estate for the period in controversy which discloses net income in the amount of $33,257.04. The Stipulation of Facts also contains the first and final account for Preston's estate which discloses disbursements for the year 1951 in the sum of $3,268.74.

Furthermore, Appellee bases its legal conclusion that there was no income in Preston's estate which could be set aside for charity on the assumption that expenses incurred in administering Preston's estate were chargeable to income. Appellee's assumption is clearly erroneous. Under

California law, in the absence of a contrary direction in the will, expenses of administration are chargeable against the corpus of an estate rather than against the income thereof. Appellee must be aware of this rule because the Commissioner of Internal Revenue correctly contended in connection with an estate probated under the laws of the State of California that the widow's allowance, which is an ordinary expense of administration,[1] was a charge against the corpus of the estate and not against the income. Thus, in *Caroline T. Carson,* 8 T.C.M. 1100 (1949), the Tax Court cited Sections 300, 680, and 750 of the Probate Code of the State of California,[2] dealing with expenses of administration and agreed with the Commissioner's contention that the family allowance is an expense of administration and "is a charge against the corpus of the estate" (8 T.C.M. at 1102).[3] See also *Title Insurance and Trust Co.,* 25 B.T.A. 805 (1932). Cf. *Slocum v. Bowers,* 15 F. 2d 401, 404, aff'd 20 F. 2d 350 (2d Cir. 1927).

---

[1]*Estate of Cutting,* 174 Cal. 104, 109 (1916).

[2]The Tax Court also cited *Re Wever's Estate,* 12 Cal. App. 2d 237 (1936); *In re Haselbud's Estate,* 26 Cal. App. 2d 375 (1938); and *In re King's Estate,* 19 Cal. 2d 354 (1942).

[3]If Preston's will had directed that administration expenses be charged to income, they would have been so charged, pursuant to Section 750 of the Probate Code of the State of California. Such a provision appeared in the instruments involved in the cases cited by the Government as authority for its position. *Bank of America National Trust and Sav. Assn. v. Commissioner,* 126 F. 2d 48 (9th Cir. 1942); *Boston Safe Deposit & T. Co. v. Commissioner,* 66 F. 2d 179 (1st Cir. 1933). Preston's will, however, left his entire estate to Mary, with no provision for the payment of administration expenses. As a result, the general rule in California that expenses of administration are chargeable to corpus applies to the estate at bar.

Appellee's argument is likewise inconsistent with the position it takes with respect to the computation of a charitable remainder for estate tax purposes. In such cases Appellee requires that the deduction for the charitable gift be reduced by expenses of administration on the theory that such expenses are charges against the corpus of the estate thereby reducing the amount of corpus available or passing to the charity.

CONCLUSION.

Appellee's brief in answer would appear to contain no compelling argument for affirming the District Court's decision. Accordingly, for the reasons stated in Appellant's opening brief, it is respectfully submitted that Congress' design "to forego some possible revenue in order to promote aid to charity" (*Old Colony Trust Co. v. Commissioner,* 301 U.S. 379, 384 (1937)), should not be here defeated by an unduly narrow construction of a broad relief provision.

Dated, San Francisco, California,
December 17, 1957.

Robert C. Harris,
Julian N. Stern,
Charles A. Wood, Jr.,
Heller, Ehrman, White & McAuliffe,
Attorneys for Appellant.